

# Submission on the Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Bill 2023

Public Sector Gender Equality Commissioner, Victoria

March 2023

## 1. Introduction

As Victoria's Public Sector Gender Equality Commissioner (Commissioner), I welcome the opportunity to provide a submission to the Senate Finance and Public Administration Committee on the Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Bill 2023 (Bill).

This Bill is an important opportunity to expand and improve on the foundations of the *Workplace Gender Equality Act 2012* (Cth) (WGE Act), improve gender equality in Australian workplaces, and improve transparency in gender pay gap reporting. I note that the Bill implements in full or in part recommendations 2, 3, 5 and 9 of the 2021 [WGEA Review Report](#) (Report).

I also note that the Bill's explanatory memorandum states that further changes would be made to the *Workplace gender equality (Matters relating to gender equality indicators) Instrument 2013* (Indicators Instrument) and the *Workplace gender equality (Gender equality standards) Instrument 2014* (Standards Instrument). On 3 February 2023, these two Instruments were repealed and replaced with the 2023 Indicators Instrument and the 2023 Standards Instrument.

This submission supports the Bill. It also recommends additional reforms that in my view, will further promote gender equality outcomes and drive progress towards closing the gender pay gap across Australian workplaces. These recommendations relate to amendments to the Bill, and other reforms that the Australian Government and Workplace Gender Equality Agency (WGEA) should consider alongside the Bill, such as changes to the Indicators Instrument and Standards Instrument. My recommendations align with the recommendations of the Report, or otherwise align with the recommendations in [my 2021 submission](#) to the Review of the WGE Act (Review).

These views and recommendations are based on my experience in implementing and operationalising Victoria's *Gender Equality Act 2020* (Vic) (GE Act), as well as my previous experience serving as the South Australian Commissioner for Equal Opportunity and administering the South Australian *Equal Opportunity Act 1984*. They are also informed by Victoria's baseline report on the 2021 public sector workplace gender audit data collected under the GE Act ([Baseline report](#)), and the [Inquiry into Economic Equity for Victorian Women](#).



## 2. Response to the Bill

### 2.1. Publishing gender pay gap information

I support the proposed amendments contained in the Bill relating to publishing gender pay gap information at an employer level. Transparency is a key tool to drive down the gender pay gap. Allowing public access to remuneration data holds employers to account and demonstrates that the government is serious about progress. It will also lead to important public discussions about the state of gender equality across sectors and at individual organisations, and what progress needs to be made. This discourse is particularly important in the context of COVID-19 recovery due to the increase in the national gender pay gap during the pandemic.<sup>1</sup>

Recommendation 7 of the Report recommended that the Indicators Instrument be amended to include mandatory reporting of, amongst other matters, remuneration data for Chief Executive Officers (CEOs) or equivalent.

Only 22.3% of CEOs in Australia are women,<sup>2</sup> and men are twice as likely as women to be in the top earnings quartile (33% of men earn above \$122,000 compared to 17% of women in the same quartile).<sup>3</sup> Currently, the WGE Act and its legislative instruments preclude the mandatory collection of CEO remuneration data, meaning the gender pay gap at the CEO level is not fully clear.

I strongly encourage the Australian Government to consider implementing recommendation 7.1(d) of the Report alongside this Bill, to enable WGEA to collect CEO remuneration data. I do not propose that individual remuneration be public, however, collection of this data will enable WGEA to aggregate and calculate an organisation's gender pay gap with and without CEO remuneration for more analysis and insights.

Further, WGEA should publish CEO remuneration at an industry level. This would enable a comparison of gender pay gaps at the CEO level across all industries. Without these changes, gender pay gap statistics will continue to be incomplete, and the gender pay gap will remain under-reported.

While Division 1 of the Bill will significantly improve gender pay gap transparency across Australia, I also recommend that these changes are underpinned by a set of gender pay equity principles. Victoria has prescribed a set of gender pay equity principles that organisations subject to the GE Act must have regard to when

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<sup>1</sup> Inquiry into Economic Equity for Victorian Women (January 2022), [Final Report](#), p. 52 (accessed 28 February 2023).

<sup>2</sup> WGEA (December 2022), [Australia's Gender Equality Scorecard 2021-22](#), p. 4, accessed 21 February 2023.

<sup>3</sup> WGEA, [Australia's Gender Equality Scorecard 2021-22](#), p. 17.



developing their gender equality action plans.<sup>4</sup> These principles are included at [Appendix A](#).

The *Fair Work Act 2009* (Cth) (Fair Work Act) was also amended in December 2022 to include a set of gender pay equity principles, which the Fair Work Commission must now consider when performing their functions and exercising their powers.<sup>5</sup> These principles include the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work, providing workplace conditions that facilitate women's full economic participation, and addressing gender pay gaps.

The Australian Government should consider strengthening the objectives of this Bill, and the WGE Act, by incorporating a similar set of gender pay equity principles into the WGE Act (or in accompanying guidance material), in line with Victoria's and the Fair Work Commission's gender pay equity principles. These principles should include, but not be limited to, pay transparency and addressing gender-based undervaluation of work.

### Recommendation 1

That the Australian Government:

1. Subject to recommendation 1(a) and 1(b) of this submission, implement recommendation 7.1(d) of the Report by amending the Indicators Instrument to include mandatory reporting of remuneration data for CEOs.
  - a. Gender pay gaps should be aggregated so that an organisation's gender pay gap can be calculated and published both with and without CEO remuneration included.
  - b. CEO remuneration data should be published at the industry level, to enable a comparison of gender pay gaps at the CEO level across all industries.
2. Incorporate a set of gender pay equity principles into the WGE Act, or in accompanying guidance material, including but not limited to pay transparency and addressing gender-based undervaluation of work.

## 2.2. Gender equality standards

I welcome the news that recommendation 3.1 of the Report will be implemented in part by this Bill (recommendation 3.1(c)), and through changes to the Instruments under the WGE Act. Renaming the 'minimum standards' to 'gender equality standards' may seem a minor amendment, but language in messaging is vital for shifting attitudes. By renaming the 'minimum standards' to 'gender equality standards', the Bill makes clear the increased ambitions of the WGE Act and WGEA

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<sup>4</sup> [Gender Equality Regulations 2020](#), r. 5A.

<sup>5</sup> Fair Work Commission (December 2022), [Gender pay equity in the Fair Work Act](#) (accessed 27 February 2023).



to progress workplace gender equality, and to raise the bar on what is expected by workplaces across Australia.

I note that the 2023 Standards Instrument has implemented recommendation 3.1(b) of the Report, now requiring all relevant employers with 500 or more employees to have policies or strategies in place against all six gender equality indicators.

I urge the Australian Government to also implement recommendation 3.1(a) of the Report, which would require relevant employers to commit to, achieve and report to WGEA on measurable genuine targets against three of the six indicators.

I note and welcome Minister Gallagher's commitment to consulting on and progressing this reform.<sup>6</sup> I request that the Australian Government or WGEA consult with me and my office, the Commission for Gender Equality in the Public Sector (Commission) during this process. With our experience in implementing and operationalising Victoria's GE Act, we are well placed to provide expert knowledge and advice on requiring progress against gender equality indicators.

Under the GE Act, Victorian public sector organisations are required to develop and implement a Gender Equality Action Plan (GEAP) every four years based on the result of a workplace gender audit. These organisations are also required to make reasonable and material progress against the GE Act's workplace gender equality indicators<sup>7</sup>, and report on their progress against these indicators every two years.<sup>8</sup>

The updated Standards Instrument is a good start, and a significant improvement on the existing minimum standards. However, I strongly recommend that the Standards Instrument be amended so that the new gender equality standards apply to **all** relevant employers under the WGE Act, not just employers with 500 or more employees.

The WGEA consultation paper for the Review noted that 99.2% of employers with 100-499 employees comply with the current minimum standards. WGEA's own submission to the Review suggested that this is likely because most organisations have a policy or strategy in place for the prevention of sex-based harassment and discrimination.<sup>9</sup> As the Report noted, the current 'minimum standards' are out of step with community expectations about what needs to be done to drive workplace gender equality, and merely *having* a strategy for one of the gender equality indicators does not satisfy as a 'standard' for gender equality.<sup>10</sup> A 'standard' should, at minimum, require demonstrating and reporting on progress against a gender equality indicator.

Not applying the new gender equality standards to employers with 100-499 employees will mean that progress in these workplaces will be limited. While there is

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<sup>6</sup> Commonwealth, [Parliamentary Debates](#), Senate, 8 February 2023, 71 (Katy Gallagher, Minister for Women).

<sup>7</sup> [Gender Equality Act 2020](#) (Vic), section 16.

<sup>8</sup> [Gender Equality Act 2020](#) (Vic), section 19(c)(i).

<sup>9</sup> WGEA (November 2021), [Submission to the Review of the Workplace Gender Equality Act 2012](#), p. 31, accessed 21 February 2023.

<sup>10</sup> WGEA (December 2021), [WGEA Review Report](#), p. 8, accessed 21 February 2023.



little or no publicly available information on how many people are employed by this specific cohort, Australian Bureau of Statistics (ABS) data shows that medium-sized businesses (between 20 and 199 employees) account for 2.8 million employees – almost a quarter of all employed persons in Australia.<sup>11</sup> The updated Standards Instrument creates a gap where a significant proportion of Australian workplaces will not be required to have policies or strategies in place against all six gender equality indicators.

Despite the 99.2% voluntary compliance rate with the former minimum standards, the gender pay gap persists, women remain underrepresented in leadership positions, gendered segregation continues, and sex-based harassment and discrimination rates remain high. The status quo simply cannot continue if the Australian Government is serious about driving progress towards gender equality in the workplace and closing the gender pay gap.

## Recommendation 2

That the Australian Government:

1. Implement recommendation 3.1(a) of the Report by amending the Standards Instrument to require relevant employers to commit to, achieve and report to WGEA on measurable genuine targets against three of the six gender equality indicators.
2. Consult with me and my Commission on the above to take advantage of our nation-leading experience in requiring organisations to make progress against gender equality indicators.
3. Apply the new gender equality standards to **all** relevant employers, not just employers with 500 or more employees.

## 2.3. Giving reports to governing bodies

I welcome the proposed change that requires relevant employers to provide executive summary reports and industry benchmark reports to their governing body. This is another important step in fostering a culture of transparency and embedding accountability into the reporting process.

I note that proposed section 19CA of the Bill provides that the relevant employer will fail to comply with the WGE Act if these reports are not given to the governing body.

Enforcement mechanisms are an effective and powerful disincentive for non-compliance and send the message that gender equality is taken seriously by government. Enforcement mechanisms tell organisations that work to promote and improve gender equality is not a 'nice to have' – it is an imperative.

Evidence also shows that accountability measures, such as a formal commitment by an organisation to report the outcomes of a workplace gender audit to their board or executives, corresponds to a greater narrowing of the gender pay gap. The absence of these accountability measures can lead to an action gap where, despite

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<sup>11</sup> ABS (May 2023), (Reference period: 2020-21 financial year), 'Table 1: State and territory by business size' [data set], [Australian Industry](#), accessed 27 February 2023.



insights into the state of gender equality in an organisation, nothing is done to close the gap.<sup>12</sup>

Noting the above, I support the inclusion of clause 19CA into the Bill.

However, I consider that the current compliance and enforcement mechanisms under the WGE Act are insufficient. Under the WGE Act:

- If an employer fails to comply with the Act, WGEA has the power to publicly name the employer as having failed to comply with the WGE Act and set out details of the non-compliance.
- Non-compliant employers 'may not be eligible to compete for contracts under the Commonwealth procurement framework and may not be eligible for Commonwealth grants or other financial assistance' (section 18, WGE Act).

I also note that recommendation 8 of the Report recommends that all relevant employers **must** comply with the WGEA's reporting obligations for Commonwealth grants eligibility and Commonwealth procurement participation – a strengthening from the current wording of '**may** not be eligible'. The Bill does not implement this recommendation of the Report.

In my view, the recommended compliance mechanism is insufficient. While it means that non-compliant employers would not be eligible for Commonwealth grants or procurement participation, there would be no consequence for employers who are **not** seeking Commonwealth grants or procurement participation, other than the possibility of being publicly named by WGEA for non-compliance.

The Australian Government should give serious consideration to strengthening the compliance and enforcement mechanisms within the WGE Act.

There are a range of compliance and enforcement mechanisms available to the Commissioner under Victoria's GE Act that the Australian Government may consider as part of this Bill. For example, if a compliance matter cannot be resolved informally, a compliance notice may be issued to the organisation.<sup>13</sup> A compliance notice may require the organisation to take action that is reasonably required to comply with the GE Act. If an organisation does not take the action required in a compliance notice, the GE Act provides the Commissioner with the power to:

- accept a written undertaking from the defined entity
- recommend the Minister for Women take action to ensure compliance
- publish the name of the defined entity on the Commissioner's website, and/or
- apply to the Victorian Civil and Administrative Tribunal for an order enforcing the compliance notice.<sup>14</sup>

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<sup>12</sup> Inquiry into economic equity for Victorian Women, *Final Report*, p. 104.

<sup>13</sup> [Gender Equality Act 2020](#) (Vic), section 22(1)

<sup>14</sup> [Gender Equality Act 2020](#) (Vic), section 26



### Recommendation 3

1. Strengthen the compliance and enforcement mechanisms in the WGE Act where appropriate, in line with the compliance mechanisms under Victoria's GE Act.
2. Failing the above, implement recommendation 8 of the Report so that non-compliant relevant employers (including those failing to comply with proposed subsections 16C(1), (2) or (3) of the Bill) will not be eligible for Commonwealth grants eligibility or Commonwealth procurement participation.

## 2.4. Gender equality indicators

Division 4 of the Bill will align the gender equality indicators in the WGE Act with the Indicators Instrument. Currently, indicator 6 – sexual harassment, harassment on the ground of sex or discrimination – is not one of the gender equality indicators listed in the WGE Act.

Bringing the WGE Act in line with the Indicators Instrument demonstrates that sex-based harassment and discrimination is a core gender equality standard. It sends a message that the Australian Government is serious about tackling sex-based harassment and discrimination in Australian workplaces.

The six indicators under the WGE Act cover a broad range of workplace gender equality data. I consider there is opportunity to build on this set of indicators, both to generate more detailed and fulsome data insights as well as to provide clearer guidance on key areas for employer attention and action.

For example, while it is acknowledged that the current data collection includes ANZSCO occupational groups, more attention and focus could be given to addressing occupational and industrial segregation as it is a key driver of the gender pay gap.<sup>15</sup> Similarly, while data on recruitment and promotion is currently collected, it is encompassed under the gender composition indicator. Separating these important areas out as their own indicators would provide a clearer message about where effort needs to be concentrated.

Other opportunities to build on existing data collection around career development, flexible working, and sexual harassment would provide a more nuanced picture of the drivers of and barriers to gender equality.

In particular, the Indicators Instrument should prescribe the collection of data in relation to the incidence of sex-based harassment and discrimination, provided via anonymous staff survey data.

The Australian Human Rights Commission's (AHRC) most recent national survey on workplace sexual harassment found that only 18% of people who experienced

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<sup>15</sup> KPMG (2022), [She's Price\(d\)less: The Economics of the Gender Pay Gap](#), Prepared with Diversity Council Australia and WGEA, Sydney, KPMG, accessed February 2023.



sexual harassment in the last 5 years made a formal report or complaint.<sup>16</sup> Reasons for not making a formal report or complaint included a fear that people would think they were overreacting, that it might affect their reputation or career opportunities, or that it would not change anything.<sup>17</sup>

Victoria's Baseline report also underlined this issue. As part of the workplace gender audits undertaken by organisations across Victoria's public sector, surveys were conducted in each organisation to gather employee experience data. The Baseline report found that, across all organisations covered by the GE Act, only 4% of women and 3% of men who said they had experience sexual harassment in the workplace went on to make a formal complaint.<sup>18</sup> Of these:

- 31% of women and 38% of men believed there would be negative consequences for their reputation if they made a complaint (for example that they would be blamed or not believed, or thought to be overreacting);
- 18% of women and 29% of men believed there would be negative consequences for their career, such as opportunities for promotion or risk of being fired; and
- 9% of both men and women did not feel safe to report the incident.<sup>19</sup>

What the ARHC report and Victoria's Baseline report both reveal is that the collection of data on formal reporting alone will tell us little about the rates of sexual harassment in the workplace. To understand the state and nature of workplace sexual harassment across Australia, WGEA must collect anonymous staff survey data.

#### Recommendation 4

That:

1. Gendered segregation within the workplace be added as an indicator.
2. Recruitment and promotion practices in the workplace be added as an indicator.
3. The Indicators Instrument be amended to prescribe additional data collection on:
  - a. the number and proportion of employees awarded higher duties opportunities and other career development opportunities (such as training), by gender
  - b. the uptake of forms of flexible work other than part-time, such as
    - i. Working more hours over fewer days
    - ii. Flexible start and finish times
    - iii. Working remotely

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<sup>16</sup> AHRC (November 2022), [Time for respect: Fifth national survey on sexual harassment in Australian workplaces](#), p. 130, accessed 28 February 2023.

<sup>17</sup> ARHC, [Time for respect](#), pp. 152-154.

<sup>18</sup> CGEPS (September 2022), [Baseline report – 2021 workplace gender audit data analysis](#), p. 58, accessed 28 February 2023.

<sup>19</sup> CGEPS, [Baseline report](#), Fig 3.5.





- iv. Shift swap
- v. Job sharing
- vi. Study leave
- vii. Purchased leave
- viii. Using leave to work flexible hours
- c. hours worked (FTE)
- d. the incidence of sex-based harassment and discrimination, provided via anonymous staff survey data.



## 3. Summary of recommendations

### Recommendation 1

That the Australian Government:

1. Subject to recommendation 1(a) and 1(b) of this submission, implement recommendation 7.1(d) of the Report by amending the Indicators Instrument to include mandatory reporting of remuneration data for CEOs.
  - a. Gender pay gaps should be aggregated so that an organisation's gender pay gap can be calculated and published both with and without CEO remuneration included.
  - b. CEO remuneration data should be published at the industry level, to enable a comparison of gender pay gaps at the CEO level across all industries.
2. Incorporate a set of gender pay equity principles into the WGE Act, or in accompanying guidance material, including but not limited to pay transparency and addressing gender-based undervaluation of work.

### Recommendation 2

That the Australian Government:

1. Implement recommendation 3.1(a) of the Report by amending the Standards Instrument to require relevant employers to commit to, achieve and report to WGEA on measurable genuine targets against three of the six gender equality indicators.
2. Consult with me and my Commission on the above to take advantage of our nation-leading experience in requiring organisations to make progress against gender equality indicators.
3. Apply the new gender equality standards to **all** relevant employers, not just employers with 500 or more employees.

### Recommendation 3

1. That the compliance and enforcement mechanisms in the WGE Act be strengthened where appropriate, to align with the mechanisms under the GE Act.
2. Failing the above, implement recommendation 8 of the Report so that non-compliant relevant employers (including those failing to comply with proposed subsections 16C(1), (2) or (3) of the Bill) will not be eligible for Commonwealth grants eligibility or Commonwealth procurement participation.

### Recommendation 4

That:

1. Gendered segregation within the workplace be added as an indicator.



2. Recruitment and promotion practices in the workplace be added as an indicator.
3. The Indicators Instrument be amended to prescribe additional data collection on:
  - a. the number and proportion of employees awarded higher duties opportunities and other career development opportunities (such as training), by gender
  - b. the uptake of forms of flexible work other than part-time, such as
    - i. Working more hours over fewer days
    - ii. Flexible start and finish times
    - iii. Working remotely
    - iv. Shift swap
    - v. Job sharing
    - vi. Study leave
    - vii. Purchased leave
    - viii. Using leave to work flexible hours
  - c. hours worked (FTE)
  - d. the incidence of sex-based harassment and discrimination, provided via anonymous staff survey data.



# Appendix A

## Gender pay equity principles

Regulation 5A of the Gender Equality Regulations 2020 sets out the following gender pay equity principles, which defined entities must take into account when preparing their Gender Equality Action Plans:

### 5A Gender pay equity principles

- (1) For the purposes of section 10(1)(c) of the Act, a prescribed matter is how the defined entity has taken the following gender pay equity principles into account in preparing the Gender Equality Action Plan—
  - (a) equal pay for work of equal or comparable value, which refers to work valued as equal or comparable in terms of skill, effort, responsibility and working conditions, including different types of work;
  - (b) employment and pay practices are free from bias and discrimination, including the effects of unconscious bias and assumptions based on gender;
  - (c) employment and pay practices, pay rates and systems are transparent and information about these matters is readily accessible and understandable;
  - (d) employment and pay practices recognise and account for different patterns of labour force participation by employees who undertake unpaid or caring work;
  - (e) interventions and solutions are collectively developed and agreed to, sustainable and enduring;
  - (f) employees, unions and employers work collaboratively to achieve mutually agreed outcomes.
- (2) In subregulation (1)(a), **pay** means remuneration and includes but is not limited to salary, bonuses, overtime payments, allowances and superannuation.